

1
2
3
4 MICHAEL JEFFREY MARLIN,
5 Plaintiff,
6 v.
7 WILLIAM KNIPP,
8 Defendant.

9 Case No. 12-cv-04776-JD

10
11
12
13 **ORDER DENYING HABEAS PETITION**

14
15
16
17 **INTRODUCTION**

18 Petitioner Michael Jeffrey Marlin, a state prisoner currently in custody at Mule Creek State
19 Prison in Ione, California, seeks federal habeas relief under 28 U.S.C. § 2254. Petitioner is
20 represented by counsel.

21 Petitioner's two main claims for habeas relief are both tied to the absence of his mother at
22 his trial. At trial, petitioner took the stand and testified on his own behalf. He did not deny that he
23 shot and killed the victim, James "Jimmy" Redenius, but Marlin argued that the killing was not
24 murder, because he had acted in defense of himself and his mother, Kelly Marlin.

25 In the federal habeas petition that is now before the Court, Marlin claims that the
26 prosecutor made statements during closing argument that improperly commented on the absence
27 of Ms. Marlin at his trial. Petitioner also claims that the appellate court improperly upheld the trial
court's denial of his new trial motion, which he made when his mother later came forward, after
his conviction but prior to sentencing. Petitioner makes a third and final claim that the state court
misapplied state sentencing laws -- applying two sentences for what he contends is the same act --
in a manner that is cognizable on federal habeas review.

After carefully considering the parties' written briefs and oral arguments at the hearing, the record and governing law, the Court denies the petition.

BACKGROUND

Petitioner was sentenced to a total sentence of 48 years to life after being found guilty of second degree murder, first degree burglary and being a felon in possession of a firearm. In his direct appeal, petitioner raised the same three grounds that he argues on his current petition before the Court, but the California Court of Appeal affirmed in full the trial court's judgment in a reasoned opinion. *See People v. Marlin*, No. A123166, 2011 WL 721458 (Cal. Ct. App. March 2, 2011) (see Respondent's Exhibit C). Marlin sought further review by the California Supreme Court, but his petition for review was denied without comment. The following underlying facts are those that are relevant to the issues before the Court, and they are drawn from the California Court of Appeal's opinion, unless otherwise noted.

Petitioner Marlin's conviction and imprisonment arise out of the shooting and killing of a man named James Redenius at Redenius's home in Willits, California on December 16, 2007. Marlin admitted to the shooting and killing, but he testified that it was in defense of his mother, Kelly Marlin. (As did the California Court of Appeal, the Court will refer to Ms. Marlin as "Kelly," for the sake of clarity.)

Marlin and Kelly had encountered Redenius four days before the shooting, on December 12, 2007, when Marlin and Kelly were at Al's Redwood Room for karaoke night. Sometime after midnight, while Marlin was paying their bill, Kelly stepped outside and saw Redenius punching his pregnant girlfriend in the face. Kelly later told Marlin that when she tried to intervene, Redenius "grabbed her by the throat, threw her to the ground, and started kicking her in the face." 2011 WL 721458, at *1. Upon running outside at the news that "some ladies just got beat up," Marlin found that his mother's "'face was all swollen, . . . she had a bloody chunk of skin out of her nose, [and] she had scrapes on her forehead' and elbows." *Id.* She was crying and very upset. Willits Police Officer Mark Heaney arrived at about 2:00 a.m., and he spoke to Marlin at the scene. Marlin, "who was very angry, said if the police did not catch Redenius, "'we're going to get him,'" or something to that nature.'" *Id.*, at *2.

1 Redenius's reputation for violence was well known in the local community, as Marlin
2 learned after Redenius's attack on Kelly at Al's Redwood Room. Among other things, a sister of
3 Redenius's ex-wife told Marlin that "throughout their marriage he beat the shit out of her and
4 threatened to kill her. There w[ere] police reports about it. The police never really helped her
5 out." *Id.* The ex-wife also "had a restraining order against" Redenius. *Id.* A man named Trevor
6 told Marlin that Redenius was "a bad guy" and that "most people don't testify against him because
7 he goes after them." *Id.* At trial, a 50-year-old woman who lived across the street from Redenius
8 testified that he had once "punched her" when she refused to pick up trash scattered by garbage
9 collectors. *Id.* "She contacted police, but no action was taken against Redenius." *Id.* A man
10 named John Simmons was also "headbutted" by Redenius at a bar after refusing to fight him, and
11 when he subsequently filed a police report, no charges were filed against Redenius. *Id.*

12 On December 16, 2007, four days after the initial encounter at Al's Redwood Room, Kelly
13 and Marlin went out to a pizza parlor in Willits. They spent about four to five hours there, where
14 Marlin "drank 'quite a bit' -- 'at least eight beers.'" *Id.*, at *2. They left in Kelly's car, with Kelly
15 driving, to deliver a pizza to Marlin's brother. "Marlin did not know where Redenius lived, but
16 Kelly pointed out his home." *Id.*

17 For the key events that came next, the Court quotes the relevant portion of the Court of
18 Appeal's opinion in full:

19 Marlin "jumped out of her car and . . . ran up to the door." He began
20 pounding on the door with his fist, and kicked the door once.
21 Through a window in the door, Marlin saw a man walk toward the
22 door, but he did not open it. In the meantime, Kelly pulled her car
23 behind Marlin. She jumped out of the car and screamed "'Mike, get
24 in the car now.' Marlin started to get in the car, when Redenius
25 came out the front door. Kelly went up to Redenius and said "'I'm
26 sorry, we have the wrong place. [¶] . . . [¶] It's a mistake.' Marlin
27 saw Redenius "start to attack" Kelly, and she was "thrown to the
28 ground."

When Marlin saw his mother thrown to the ground, he reached in
the car and "grabbed out her pistol," which was in a bag behind the
seat. Marlin knew the gun was there that evening because Kelly had
told him. Marlin did not know where or how she got the gun, how
long she had it, or when he found out she had it. After he grabbed
the pistol, he saw Redenius "attacking" his mother, who was on the
ground on her back. Redenius then pointed a gun at Marlin and
fired.

1 Marlin “took a shot at him.” He did not know if he fired the first
2 shot or not, but both guns fired. Redenius turned and ran inside.
3 Marlin followed, “right on his tail.” Redenius turned left down a
4 hallway, and Marlin stopped at the corner. He pointed the gun and
5 looked directly down the hallway. Redenius turned around, pointed
6 his gun at Marlin, and ducked behind and slammed a door. Marlin
7 fired five shots into the door as Redenius was shutting it “[b]ecause
8 he had a gun and I didn’t want to get shot.”

9 After emptying the gun of bullets, Marlin left the residence. His
10 mother and the car were no longer outside. At that point, Marlin did
11 not know his shots had hit Redenius. He “took off,” and walked all
12 night. After contacting his brother the next day, Marlin turned
13 himself in.

14 2011 WL 724158, at *2-3.

15 Officer Heaney, the same officer who had responded to the incident at Al’s Redwood
16 Room, arrived at the shooting scene. “He and Kelly recognized each other, and Kelly told him,
17 ‘My son did it,’ before Heaney asked her anything.” *Id.* at *3. The trial court ruled that this out-
18 of-court statement was admissible as an excited utterance. *See* 1 RT 157 (“And my ruling . . . is
19 I’m going to allow the initial statement of Ms. Marlin to the officer where she basically
20 volunteered, Officer Heaney, my son did it. That’s a kind of a classic spontaneous declaration.
21 It’s not in response to a question. It’s just a spontaneous utterance.”).¹

22 Not admitted at trial, however, were additional statements of Kelly’s that were the subject
23 of testimony at the preliminary hearing. Another officer who had responded to the scene, Officer
24 Jacob Donahue, testified that he interviewed Kelly at the Willits Police Department sometime after
25 the shooting. 1 CT 49. He testified that Kelly told him that “[w]hen she approached the house
26 and after saying, ‘We are sorry. It’s a mistake,’ Jimmy [Redenius] told them to leave and ended
27 up pushing Kelly Marlin backwards. It sounds like she [] ended up pushing -- I am sorry -- Jimmy
28 ended up pushing Kelly backwards away from his front door.” 1 CT 55. When asked about an
injury to Kelly’s knee which Officer Donahue had photographed and believed to be “fresh,” he did
not recall her telling him that she had received it when Redenius pushed her to the ground. 1 CT

¹ As does petitioner, the Court cites to the Reporter’s Transcript as “RT” and the Clerk’s Transcript as “CT.” Both were lodged by respondent in support of respondent’s answer to the habeas petition. *See* Dkt. No. 10.

83. He did, however, recall that his report had noted that "Kelly thought Redenius might have knocked her down when he shoved her away from her (sic.) residence and that's how she got the abrasion that appeared fresh on her left knee." 1 CT 83-84.

Deputy Sheriff Jerry Dean Verdot also responded to the scene. Redenius told Verdot that “a man he had never seen before came to his door and they began arguing. Redenius told the man to ‘get the hell out of there,’ and the man ‘pulled out a gun and shot him.’” 2011 WL 721458, at *3. Redenius “went through his house, out the back window, and to a neighbor’s house to get help.” *Id.* He was pronounced dead at the hospital at 8:40 p.m. that evening.

Kelly did not testify at petitioner’s trial. “At trial, defense counsel represented to the court he had been unable ‘to locate [Kelly] for trial.’” 2011 WL 721458, at *7. After his conviction, Marlin made a motion for a new trial on the basis of newly discovered evidence -- “his mother, who could not be located during trial, had ‘c[o]me forward to testify’ and corroborate Marlin’s testimony.” *Id.*, at *6. But the trial court denied the motion.

Petitioner filed this federal habeas petition on August 24, 2012. Dkt. No. 1. His petition presents three grounds: (1) that the prosecution “violated due process” when it urged the jury to convict because the defense had “failed to produce corrob[orating] evid[ence] that the state knew existed but was unavailable and inadmissible”; (2) that there was a due process error arising from the trial court’s failure to “grant a new trial based on new evidence from Ms. Marlin that Redenius not only attacked her, but fired a gun, thus corrob[orating] that” petitioner acted in self defense or defense of another; and (3) that there was a due process violation “arising from a deprivation of a state law entitlement when” the trial court “sentenced consecutively on [the] burglary count, in derogation [of] Penal Code section 654.” *Id.* at 5-6. Each of these grounds is discussed below.

GOVERNING STANDARD

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) governs federal habeas review and sets a very high bar for petitioners to cross. Under AEDPA, a federal court may not grant a habeas petition for any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim resulted in (1) a decision that was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

1 Court of the United States,” or (2) a decision that was based on an “unreasonable determination of
2 the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

3 Under the “contrary to” clause in Section 2254(d)(1), “a federal habeas court may grant the
4 writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a
5 question of law or if the state court decides a case differently than [the] Court has on a set of
6 materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). “[A]s the
7 statutory language makes clear,” under Section 2254(d)(1), the “source of clearly established law”
8 is restricted to the Supreme Court’s jurisprudence. *Id.* “[C]ircuit precedent does not constitute
9 ‘clearly established Federal law, as determined by the Supreme Court,’ 28 U.S.C. § 2254(d)(1)”
10 and it “therefore cannot form the basis for habeas relief under AEDPA.” *Parker v. Matthews*, 132
11 S. Ct. 2148, 2155 (2012).

12 The “unreasonable application” language in Section 2254(d)(1) has also been tightly
13 construed. Under controlling precedent, “an *unreasonable* application of federal law is different
14 from an *incorrect* application of federal law.” *Harrington v. Richter*, 562 U.S. 86, 785 (2011)
15 (emphasis in original; quoting *Williams*, 529 U.S. at 410). “A state court’s determination that a
16 claim lacks merit precludes federal habeas relief so long as ‘fair-minded jurists could disagree’ on
17 the correctness of the state court’s decision.” *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652,
18 664 (2004)).

19 “Factual determinations by state courts are presumed correct absent clear and convincing
20 evidence to the contrary.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citing 28 U.S.C.
21 § 2254(e)(1)). And for claims brought under Section 2254(d)(2), a state court decision
22 “adjudicated on the merits in a state court and based on a factual determination will not be
23 overturned on factual grounds unless objectively unreasonable in light of the evidence presented in
24 the state-court proceeding.” *Id.*

25 The state court decision to which Section 2254(d) applies is the “last reasoned decision” of
26 the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). Here, that is the California
27 Court of Appeal’s opinion. And although petitioner argues that deference is not due to that
28 opinion because the state court “did not attempt to identify or discuss the correct federal rules,”

1 Dkt. No. 27 at 18, that is not correct. “When a federal claim has been presented to a state court
2 and the state court has denied relief, it may be presumed that the state court adjudicated the claim
3 on the merits in the absence of any indication or state-law procedural principles to the contrary.”
4 *Harrington*, 131 S. Ct. at 784-85. A state court decision need not cite to decisions of the Supreme
5 Court, “indeed, [avoiding the pitfalls under AEDPA] does not even require *awareness* of [the
6 Supreme Court’s] cases, so long as neither the reasoning nor the result of the state-court decision
7 contradicts them.” *Early v. Packer*, 537 U.S. 3, 8 (2002) (emphasis in original).

8 If, taken collectively, this standard under Section 2254(d) “is difficult to meet, that is
9 because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a
10 complete bar on federal court relitigation of claims already rejected in state proceedings.”
11 *Harrington*, 562 U.S. at 786.

12 DISCUSSION

13 I. PROSECUTORIAL MISCONDUCT

14 Petitioner’s first claimed ground for habeas relief takes issue with the fact that, in closing
15 argument, the prosecutor “repeatedly urged the jury to reject petitioner’s defense of provocation,
16 defense of another and self-defense because it was not corroborated, not even by his own mother.”
17 Dkt. No. 27 at 19. Petitioner contends that this was prosecutorial misconduct that violated his
18 right to due process, and that the state court’s conclusion to the contrary “constituted an
19 unreasonable application of clearly established federal law as articulated by the United States
20 Supreme Court” under Section 2254(d)(1). *Id.* at 29.

21 In her closing argument,² the prosecutor made the following statements:

22 We don’t have too many eyewitness[es] to what happened when
23 James Redenius was killed on his front porch. [¶] Only one person
24 has come in here and said what he saw, but we received evidence in
other ways.
25 . . .
26

27 ² Petitioner has referred to the prosecutor as a “he” throughout his briefing and at the hearing on
28 this petition, but a review of the trial transcript shows that the prosecutor was “Ms. Ravitch,” a
woman.

1 The only evidence you've received that would support any type of
2 legal justification has come from one source, and one source alone.
3 The defendant, in his testimony.

4 ...

5 [Kelly] was on her back with her hands up and her knee was
6 bleeding and the defendant was leaning over her holding a small,
7 black object when Mike Marlin fired the fatal shot. That's what you
8 just heard. That's why he's not guilty. But let's take it apart for a
9 minute. Okay.

10 Before you accept any fact as true, you have to consider the source.
11 On her back with her hands up. What's the evidence of that? Not in
12 the spontaneous statements that she makes to the people she runs to
13 hysterical telling them -- telling them that her son just killed this
14 man, not in the statements of the victim as he's collapsing, dying on
15 his neighbor's porch. Where are we getting that fact that she's on
16 her back with her hands up? Him, the defendant.

17 ...

18 Well, her knee is bleeding in this photograph. That's indisputable.
19 Absolutely true, to borrow one of [defense counsel's] remarks. But
20 what do we know about that happened? It came from the defendant.
21 Oh, we know that the victim threw her down because that's what he
22 does. That's his MO. He throws people to the ground. Well, we
23 didn't hear it from the person whose knee was bleeding. And we
24 didn't hear it from the person who allegedly did.

25 7 RT 1250, 1256, 1294-14 - 1294-15.

26 In its opinion, the California Court of Appeal began its analysis of this issue by noting that
27 “[a] prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it
28 infests the trial with such unfairness as to make the conviction a denial of due process.” 2011 WL
 721458, at *3 (citing *People v. Morales*, 25 Cal. 4th 34, 44 (2001)). The California Court of
 Appeal concluded, however, that the statements were not misconduct and instead constituted a
 “fair comment on the evidence” for two primary reasons. First, the Court of Appeal reasoned that
 the challenged statements were not improper under state law because “the claimed corroborating
 evidence [*i.e.*, Kelly’s excluded statements to Officer Jacob Donahue] in this case was not
 improperly excluded -- the parties do not dispute it was hearsay not falling within any exception.”
 Id. at *5. Second, the Court of Appeal based its conclusion on its finding that the “prosecutor in
 this case did not argue a known falsehood to the jury,” because “Kelly’s excluded statement did
 not corroborate Marlin’s testimony at trial.” *Id.*, at *6.

1 On this federal habeas petition, Marlin asserts that the state appellate court's conclusion
2 constituted a violation of Section 2254(d)(1) because it was an unreasonable application of cases
3 such as *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Graves*
4 *v. United States*, 150 U.S. 118, 121 (1893) and *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).
5 See Dkt. No. 27 at 20-21. That is not correct.

6 *Graves*, 150 U.S. 118 (1893), is the case that comes closest to being applicable. But in that
7 case, while the Supreme Court held that the district attorney's closing argument to the jury
8 commenting upon the absence of the defendant's wife was improper, it made clear that this
9 holding rested in large part on the fact that in that case "the wife was not a competent witness,
10 either in behalf of or against her husband. If he had brought her into court, neither he nor the
11 government could have put her upon the stand . . ." 150 U.S. at 121. See also *id.* at 120 ("Had
12 the wife been a competent witness, the comments upon her absence would have been less
13 objectionable."). Here, there is no suggestion that Kelly would have been incompetent as a
14 witness; indeed, the very reason for her importance to the case is that she was the only other
15 surviving eyewitness to the shooting, other than petitioner himself, and petitioner sought a new
16 trial for the very purpose of introducing her testimony.

17 The other cases cited by petitioner -- *Miller*, *Napue* and *Darden* -- are inapposite, and do
18 not support petitioner's claim for relief. *Miller* stands for the proposition that the prosecution
19 cannot "deliberately misrepresent[] the truth," 386 U.S. at 6, and *Napue* for the proposition that
20 the prosecution further cannot fail "to correct the testimony of [a] witness which he knew to be
21 false." 360 U.S. 265. Critically, as petitioner conceded at the hearing, there was nothing "literally
22 false" about the prosecutor's statements in this case.

23 *Darden* also does not help petitioner, as it addresses a prosecutor's comments in closing
24 argument that included references to the defendant as "an animal." 477 U.S. at 180. The Supreme
25 Court, summarily noting that "[t]hese comments were undoubtedly . . . improper," went on to
26 examine whether these improper comments "so infected the trial with unfairness as to make the
27 resulting conviction a denial of due process." *Id.* at 181. But here, the Court need not reach the
28 question articulated in *Darden*. That is because petitioner has failed to establish that the California

1 Court of Appeal's conclusion that the prosecutor's statements were not improper were "contrary
2 to, or involved an unreasonable application of, clearly established Federal law, as determined by
3 the Supreme Court of the United States." Petitioner's first claim for relief must consequently be
4 denied.

5 **II. DENIAL OF NEW TRIAL MOTION**

6 Petitioner's second ground for habeas relief raises a challenge under both Section
7 2254(d)(1) and (d)(2) of AEDPA.

8 On October 27, 2008, petitioner filed a motion for new trial in the trial court, arguing,
9 among other things, that he was entitled to a new trial on the basis of "newly discovered evidence"
10 because his mother, who "did not testify at trial" and "was physically unavailable to the defense,"
11 had "been located and is now available to the defense." 2 CT 430. The trial court denied the
12 motion, ruling as follows:

13 As to the newly discovered evidence issue, I think it can't be said
14 that the defendant's own mother, who was the other eyewitness to
the offense, her lack of presence at the trial could be considered
15 evidence that could not with reasonable diligence have been
discovered. . . . [¶] And again, as to the other witnesses who were
16 not available, it appeared to be a decision on her part or some -- the
defendant's part or somebody's, that they'd be better off without her
17 presence as the only eyewitness. She was not present for the trial in
spite of efforts by the prosecution to find her. And I think you don't
get it -- another bite at it once the trial turns out to be unsuccessful
with a strategy of the eyewitness not being present. So as to the new
18 evidence and the medial records issues, the motion is denied.
19

20 8 RT 1372-73.

21 The Court of Appeals upheld this denial, concluding that "[w]ithout any evidence in the
22 record regarding reasonable effort[s] to produce all his evidence at the trial, we cannot say the trial
23 court abused its discretion in denying the motion for new trial." 2011 WL 721458, at *7 (internal
24 quotation marks and citation omitted). Marlin contends that "[t]his finding is not supported by
25 substantial evidence[,] and the California Court of Appeal's rejection of this claim was contrary to
26 and an unreasonable application of clearly established Supreme Court law." Dkt. No. 27 at 35.

27 Taking up petitioner's Section 2254(d)(2) challenge first, that argument fails for a number
28 of reasons. As a preliminary matter, it is not clear that the Court of Appeal made any

1 “determination of the facts” that can properly be the subject of challenge under Section
2 2254(d)(2). The Court of Appeal appears merely to have observed that the record was lacking in
3 evidence showing that petitioner had put forth “reasonable effort[s] to produce all his evidence at
4 the trial” such that the trial court could be said to have abused its discretion in denying his new
5 trial motion. 2011 WL 721458, at *7.

6 A more relevant analytical approach is that articulated by our Circuit that a habeas
7 petitioner does not show an unreasonable determination of the facts under Section 2254(d)(2) by
8 merely disagreeing with the state court’s interpretation of the record but not pointing to any
9 material fact that the court failed to consider in reaching its determination. *See DeWeaver v.*
10 *Runnels*, 556 F.3d 995, 1006-07 (9th Cir. 2009). That deficiency exists here. In its opinion, the
11 California Court of Appeals considered the defense counsel’s representation that he had been
12 unable “to locate [Kelly] for trial,” the prosecutor’s statement that she “had made extensive efforts
13 to find Kelly ‘throughout the state,’” Kelly’s declaration in support of the motion for new trial as
14 well as the letter Kelly sent to the trial court in regard to sentencing, which “was not signed under
15 penalty of perjury.” *Id.*, at *7 and n.9. In his petition to this Court, Marlin has failed to point out
16 any material fact that the state appellate court failed to consider in affirming the trial court’s denial
17 of his motion for a new trial.

18 Petitioner’s claim that the same conclusion constituted a violation of Section 2254(d)(1)
19 must also be denied. Petitioner’s reply brief makes clear that the primary legal basis for his
20 challenge is *People v. Martinez*, 36 Cal.3d 816, 825 (1984). *See* Dkt. No. 27 at 42-48 (citing
21 *Martinez* throughout). But *Martinez* is a California Supreme Court case, which obviously cannot
22 serve as the source of “clearly established Federal law” under 28 U.S.C. § 2254(d)(1). Petitioner
23 has failed to identify any other U.S. Supreme Court case that the California Court of Appeals can
24 be said to have unreasonably applied.

25 Consequently, petitioner’s federal habeas claim based on the trial court’s denial of his new
26 trial motion (and the appellate court’s affirmation thereof) must also be denied.
27
28

III. SENTENCING ERROR

Petitioner's final claim is also insufficient to carry the day on his federal habeas petition. Petitioner claims that the state court made a sentencing error in applying California Penal Code Section 654. The claimed basis for the error is that California Penal Code Section 654 "provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act." Dkt. No. 27 at 49-52. Petitioner argues that the trial court erroneously found that his "intent and objective in count 1 (murder) was separate from, rather than incidental to, his intent and objective in count 2 (burglary)," thereby imposing a sentence for the burglary consecutive to his sentence for the murder which violated Penal Code Section 654's "prohibition against double punishment." *Id.*

Marlin does not dispute that his "sentencing claim is premised on a violation of a state law." *See* Dkt. No. 27 at 50. He asserts, however, that the claim is nevertheless "cognizable on federal habeas review" because "[a] sentencing error may violate due process if the state court misapplied its sentencing laws in an arbitrary, capricious, or fundamentally unfair manner." *Id.* (citing *Richmond v. Lewis*, 506 U.S. 40 (1992)).

This argument, however, rests on a misreading of *Richmond*. There, the Supreme Court made clear that "the question to be decided by a federal court on petition for habeas corpus is not whether the state sentencer committed state-law error . . ." 506 U.S. at 50; *see also id.* at 51 ("federal habeas corpus relief does not lie for errors of state law.") (citing *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Although in *Richmond*, the Court went on to state that "the federal, constitutional question" was whether the Arizona state courts' reliance on a "narrowed aggravating factor" was "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation," this was because the Court had previously ruled that the statutory aggravating factor at issue was unconstitutionally vague. *See id.* at 50, 46 ("Arizona's 'especially heinous, cruel or depraved' factor was at issue in *Walton v. Arizona*, [497 U.S. 639 (1990)]. As we explained, 'there is no serious argument that [this factor] is not facially vague.'").

As the Supreme Court has repeatedly emphasized, “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Petitioner’s arguments regarding his sentencing establish, at best, that the state court may have misapplied state sentencing law. But he has identified no U.S. Supreme Court case that supports an argument that he was in this case deprived of a “liberty interest” which “the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Hicks v. Oklahoma*, 47 U.S. 343, 346 (1980). Because petitioner has failed to identify any Supreme Court case that the state appellate court can be said to have unreasonably applied in connection with his sentencing, his habeas claim on this ground must be denied.³

CONCLUSION

13 The record in this case tells a sad story of violence and retribution in a small California
14 town. While not germane to the resolution of the petition, the Court is struck by the apparent
15 failure of local law enforcement in Willits to deal with repeated reports of violent behavior by an
16 individual in the community. Had law enforcement acted with greater resolve and direction, it is
17 possible that the tragic events in this case would not have happened. But on the record that is
18 before the Court, and under the stringent rules governing federal habeas petitions, the Court cannot
19 conclude that the writ should issue here. Consequently, Marlin's habeas petition is denied.

20 The Court also denies a certificate of appealability pursuant to Rule 11(a) of the Rules
21 Governing Section 2254 Cases. Petitioner has failed to make a “substantial showing of the denial
22 of a constitutional right” on any of his claims. *See* 28 U.S.C. § 2253(c)(2); *see also Slack v.*
23 *McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining that an applicant satisfies this standard where
24 he or she shows that reasonable jurists could find the issues debatable or that the issues are
25 “adequate to deserve encouragement to proceed further”) (internal quotation omitted).

³ At the hearing, petitioner’s counsel averred that Marlin’s sentencing claim was a 2254(d)(1) claim only. Even if construed as a (d)(2) claim, the Court must presume correct any determination of a factual issue made by a state court, and petitioner has failed to rebut the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

1 The Clerk of the Court is directed to enter judgment and close the file.
2
3 **IT IS SO ORDERED.**
4
5 Dated: October 21, 2014

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JAMES DONATO
United States District Judge